IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

INTERNATIONAL HARVESTER CREDIT CORPORATION, ET AL., *Appellants*,

vs.

ALLEN J. GOODRICH, ET AL., *Appellees*.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE APPELLANTS

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	3
Statement	4
Summary of Argument	7
Argument	8
I. Article 21 of the New York Tax Law, as here applied, fails to meet the test of due process	11
II. The lien provisions of Article 21 cannot be sustained on the ground that they are necessary for the collection of the highway use tax	13
III. Viewed as either an assessment or a lien, the lien provisions of Article 21 result in an arbitrary and unreasonable taking of appellants' property	17
Conclusion	25
Appendix A	25

CITATIONS

Cases:

Bode v. *Barrett*, 344 U.S. 583	24
Capitol Greyhound Lines v. *Brice*, 339 U.S. 542	12
Conrad v. *Atl. Ins. Co. of N. Y.*, 1 Pet. 386	20
Dunbar v. *City of New York*, 251 U.S. 516	10
Falor v. *Mong*, 47 Ohio App. 442	19
Freuhauf Trailer Co. v. *State Corporation Comm.*, 149 Kans. 465	17
Gast Realty Co. v. *Schneider Granite Co.*, 240 U.S. 55	18, 20
Gruner, In re, 295 N.Y. 510	10
Hooper v. *Wisconsin*, 284 U.S. 206	21, 23
Ingels v. *Morf*, 300 U.S. 290	12
Kansas City So. Ry. Co. v. *Road Improvement Dist. No. 6*, 256 U.S. 658	18

	Page
Karno-Smith Co. v. Maloney, 112 F. 2d 690	20
Knowlton v. Moore, 178 U.S. 41	22
Lindsay & Phelps Co. v. Mullen, 176 U.S. 126	10, 13
Marshall v. New York, 254 U.S. 380	19
Memphis & Charleston Ry. Co. v. Pace, 282 U.S. 241	18
Myles Salt Co. v. Iberia Drainage Board, 239 U.S. 478	11, 18, 21, 23
Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405	11, 18
New York v. Gebhardt, 151 F. 2d 802	18
New York Terminal Co. v. Gaus, 204 N.Y. 512	18
Ott v. Miss. Valley Barge Line Co., 336 U.S. 169	11
Pacific Finance Corp. v. Snohomish County, 160 Wash. 384	16
Provident Institution for Savings v. Jersey City, 113 U.S. 506	19
Rapid Ry. Co. v. Schroeder, 190 Mich. 684	23
St. Louis & Southwestern Ry. Co. v. Nattin, 277 U.S. 157	18
Southern Ry. Co. v. Kentucky, 274 U.S. 76	18, 22
Thomas v. Kansas City So. Ry. Co., 261 U.S. 481	11
Universal Credit Co. v. Mamminga, 214 Iowa 1135	16
United States v. Anders Contracting Co., 111 F. Supp. 700	16
United States v. E. Regensburg & Sons, 124 F. Supp. 687	19
United States v. Winnett, 165 F. 2d 149	19
Van Oster v. Kansas, 272 U.S. 465	10
W. B. Worthen Co. v. Kavanaugh, 295 U.S. 56	21

Statutes:

Alabama Code, Tit. §§ 301(34), 301(44) (1940)	27
Colorado Sess. Laws 1954, c. 31 §§ 3, 5(5)	27
Florida Stat. Ann., §§ 323.15, 323.15(1) (1943)	27
Idaho Code, § 49-127 (1948)	27
Kansas Laws 1955, c. 294	28
Kentucky Rev. Stat., § 281.815 (1953)	27
Maryland Code Ann. Art. 81, § 269 (Flacks 1951)	27
Michigan Stat. Ann., §§ 22.561, 22.564 (1937)	27
New Mexico Laws 1955, c. 276, § 7	28
New York Sess. Laws 1951, c. 74, § 1	12
New York Sess. Laws 1955, c. 165	23
New York Tax Law Art. 21, §§ 503, 506 (1954)	2, 3, 4, 6, 25
North Dakota Rev. Code, § 39-0425 (1943)	27
Ohio Rev. Code Ann., § 5728.06 (Page's 1954)	27
Oklahoma Stat. Ann. Tit. 47, §§ 22.5, 22.7 (1941)	28
Oregon Rev. Stat. Tit. 57 § 767.325 (1953)	28
South Carolina Code of Laws, § 58-1433 (1952)	28
South Dakota Code, § 44.0426 (1939)	28
Wyoming Comp. Stat. §§ 60-1327, 60-1330 (1945)	28

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 82

INTERNATIONAL HARVESTER CREDIT CORPORATION, ET AL., *Appellants*,

v.

ALLEN J. GOODRICH, ET AL., *Appellees*.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE APPELLANTS

OPINIONS BELOW

The New York Court of Appeals reviewed and affirmed without a majority opinion the judgment of the Appellate Division of the Supreme Court of New York. The dissenting opinion of the New York Court of Appeals appears at R. 20. The opinion of the Appellate Division of the Supreme Court of New York (R. 12) is reported at 284 App. Div. 604, 132 N.Y.S. 2d 541.

JURISDICTION

Pursuant to Section 546 of the New York Civil Practice Act, this controversy was submitted on a stipulated statement of facts to the Appellate Division of the Supreme Court of the State of New York, Third Department, on June 8, 1954 (R. 1-10). Appellants' contention, as stated in that Submission and Statement of Facts (R. 6-8), included the claim that Section 506 of Article 21 of the New York Tax Law was invalid and unenforceable under the Fourteenth Amendment of the United States Constitution. The Appellate Division passed on this question and held that the provision in question was valid under the United States Constitution (R. 12, 16). An appeal to the New York Court of Appeals was taken as of right, under Section 588(1) of the New York Civil Practice Act, on the ground that the case directly involved the construction of the United States Constitution (R. 11). The Court of Appeals affirmed (R. 21).

The judgment of the Court of Appeals was entered on December 31, 1954 (R. 21). The jurisdiction of this Court to review said judgment is conferred in Title 28, United States Code, Section 1257(2). On March 18, 1955, notice of appeal to this Court was served on appellees and filed in the Appellate Division of the Supreme Court of New York, Third Department (R. 24). This Court noted probable jurisdiction of the appeal on October 10, 1955 (R. 25).

QUESTION PRESENTED

Whether Article 21 of the Tax Law of the State of New York imposing a highway use tax is consistent with the Due Process clause of the Fourteenth Amendment of the Constitution to the extent that it author-

izes in Section 506 the taking of appellant's property in vehicles, of which it was the conditional vendor to an operating carrier and taxpayer, to satisfy all fees, taxes, penalties and interest accruing against the operating carrier, without regard to the origin of such tax liabilities or the identity of the vehicles by the use of which the tax liabilities were created.

STATUTES INVOLVED

New York Tax Law, Article 21.

§ 503. Imposition of Tax

In addition to any other tax or fee imposed by law, there is hereby levied and imposed a highway use tax for the privilege of operating any vehicular unit upon the public highways of this state. Such tax shall be upon the carrier except that where the carrier is not the owner of such vehicular unit, the tax shall be a joint and several liability upon both. Such tax shall be based upon the gross weight of each vehicular unit and the number of miles it is operated on the public highways in this state except as hereinafter provided. The tax for each such vehicular unit shall be computed by multiplying the number of miles operated on the public highways in this state by the appropriate weight group tax rate as it appears in the following table. When a vehicular unit is operated without any load whatsoever, the carrier shall pay the tax imposed by this section only upon the actual weight of the vehicular unit for the mileage such unit is operated without load or cargo, computed at the appropriate weight group tax rate in the following table:

[Table omitted]

§ 506. Payment of Tax

At the time of filing a return as required by this article, each carrier shall pay to the tax commission the tax imposed by this article for the period covered

by such return. Such tax shall be due and payable at the time of filing the return or, if a return is not filed when due, on the last day on which the return is required to be filed. The tax commission may grant a reasonable extension of time for paying the tax whenever good cause exists.

The fees, taxes, penalties and interest accruing under this article shall constitute a lien upon all motor vehicles and vehicular units of such carrier. The lien shall attach at the time of operation of any motor vehicle or vehicular unit of such carrier within this state and shall remain effective until the fees, taxes, penalties and interest are paid, or the motor vehicle or vehicular unit is sold for the payment thereof. Such liens shall be paramount to all prior liens or encumbrances of any character and to the rights of any holder of the legal title in or to any such motor vehicle or vehicular unit.

STATEMENT

The stipulated statement of facts upon which the controversy was submitted (R. 1-10) may be summarized as follows:

In 1953, International Harvester Company and appellant Brockway Motor Company, Inc. (hereafter Brockway) sold three tractors (i.e., the automotive portion of a tractor-trailer) to Eastern Cartage and Leasing Co., Inc. (hereafter Eastern) (R. 3, 4, 5). In each sale, appellants took a valid conditional sales agreement, reserving the title in the vehicles in themselves as security for payment of the purchase price. The conditional sales contracts were duly filed, according to law, in the office of the Clerk of the Town of Rotterdam, Schenectady County, New York (R. 3, 4, 5). The conditional sales agreements pertaining to the two tractors sold by International Harvester Company were assigned to appellant International Harvester Credit Corporation (hereafter International) (R. 3, 5).

On January 22, 1954, International replevied the two tractors from Eastern for default in payment of the balance then due, amounting to $4,578.79 on each tractor (R. 3, 5). Both tractors were repossessed and purchased at public sale by International on February 16, 1954, for $3,500 each (R. 3, 6). On March 26, 1954, Brockway repossessed the tractor which it had sold to Eastern for default in the payment of $5,625 (R. 4). It is stipulated that the value of this tractor at the time of repossession did not exceed $5,625 (R. 4). On March 17, 1954, International sold one of the tractors to Philomena Colafemina of Schenectady, New York, and warranted that the tractor was free from any charge or encumbrance (R. 3). On the same day, International sold the other tractor to a Massachusetts corporation for operation outside the State of New York (R. 6). Brockway still possesses the tractor which it repossessed from Eastern (R. 4).

More than a month later, on April 21, 1954, appellees, constituting the State Tax Commission of the State of New York (R. 1), for the first time, asserted that a lien amounting to $3,698.04 attached to each of the two tractors then in the State of New York and to the $4,300 which International had received in payment for the tractor which had been sold to the Massachusetts corporation (R. 4). It subsequently developed that Eastern, a carrier subject to the highway use tax imposed by Article 21 of the New York Tax Law, had become delinquent in filing its return and paying its taxes both before and after its purchase of the three tractors from appellants, and that, due to its entire course of operations from January 1952 to February 1954, Eastern was liable for taxes, penalties and interest aggregating $3,698.04 (R. 4). These taxes were levied on Eastern for the operation of at least fifteen motor vehicles on the public highways (R. 4). At the time

of the conditional sale of the three tractors by appellants to Eastern, appellees had taken no action with respect to the taxes in question.

Article 21 of the New York Tax Law imposes a highway use tax "for the privilege of operating any vehicular unit upon the public highways" of New York. Sec. 503. This use or privilege tax is imposed "upon the carrier except that where the carrier is not the owner . . . the tax shall be a joint and several liability upon both the owner and the carrier." Sec. 503. The highway use tax is measured by the number of vehicles and the weight and amount of highway use of each vehicle. The carrier and the owner are under a duty to keep records and make returns. Failure to fulfill such duties calls for the imposition of penalties. At all times here relevant, it was further required that all reports and returns made under Article 21 be kept secret, as is the lien which is not required to be filed or recorded. Sec. 514. Thus it was impossible for appellants to have had any knowledge of Eastern's tax delinquency at the time of the conditional sales by them to Eastern.

All taxes, fees, penalties and interest become a prior lien upon every vehicle operated by the delinquent carrier. The lien attaches to any vehicle the moment it is operated on the public highway by the carrier. Thus, once the tax accrues as to any vehicle operated by the carrier, it becomes a prior charge upon all vehicles operated by the carrier irrespective of ownership. The lien is expressly made "paramount to all prior liens and encumbrances of any character and to the rights of any holder of the legal title in or to any such motor vehicle or vehicular unit." Sec. 506.

Appellees concede that neither appellant could have limited its liability by filing appropriate returns as

owner of the vehicles which were then being used by Eastern, thus limiting its liability to the tax which accrued from the use of the vehicles which each owned. The Attorney General of New York ruled, on June 15, 1954, that neither conditional vendors nor chattel mortgagees could be taxed as the "owners" of the vehicles involved.

According to the stipulation of facts (R. 4), the amount of the lien asserted against each of the three tractors owned by appellants includes:

> "(a) taxes incurred as a result of the operation of the three motor vehicles purchased from the respective plaintiffs as herein set forth, (b) taxes incurred as a result of the operation of other motor vehicles purchased from the respective plaintiffs and from others, (c) taxes for periods both prior and subsequent to the purchase of the aforesaid motor vehicles by Eastern from the plaintiffs, (d) taxes for periods prior to the repossession of said motor vehicles by plaintiffs which were assessed prior to such repossession, (e) taxes for periods prior to the repossession of said motor vehicles by plaintiffs which were assessed subsequent to such repossession, and (f) taxes for periods subsequent to the repossession of said motor vehicles by plaintiff International."*

SUMMARY OF ARGUMENT

Appellants do not question the power of a state to impose a prior lien for use taxes attributable to the use of their property. However, appellants do assert that the giving of priority to a lien for completely unrelated use taxes necessarily results in an unconstitu-

* Appellees now concede, however, that amounts included under (f)—i.e., tax liabilities of the carrier accruing after a conditional vendor repossesses a vehicle from a delinquent carrier—should not be included within the lien on that vehicle. See R. 16.

tional taking of appellants' property to the extent the lien is for delinquent taxes on the property of a third person.

The arbitrariness of the charge which results in a taking of appellants' property cannot be sustained by the invocation of a state's prerogative right of lien priority. The issue is not priority but the reasonableness of what was made prior. Nor can such a taking be sustained on the ground that either public good was served thereby or that the person whose property was taken had notice, consented or received some benefit. Such has been the result in decisions in other states, and such is the teaching of the decisions of this Court.

ARGUMENT

There are only a few salient facts which must be kept in mind. First, it is significant that the charges in question arose from the operation by Eastern of at least fifteen tractors and trucks on the highways of New York for a period of over two years from January 1952 through February 1954. These are the charges which appellees now assert may be imposed on each of the three vehicles owned by appellants—the full amount of the taxes assessed against Eastern for all of its highway operations during the entire two year period.

Second, it is equally significant that appellees are undertaking to seize a non-taxpayer's property to pay the unrelated taxes of a taxpayer. Eastern, the taxpayer, concededly had no property interest in the tractors at the time the lien was asserted; the tractors were the property of appellants. It is further conceded that the only property interest which Eastern ever had in the property was the right of possession

and the right to use the tractors. It is also stipulated that the charges assessed against appellant's property bear no relation either to the operation of appellants' tractors by Eastern or to the equitable interest which Eastern had in the tractors under the conditional sales contract. Finally, it is admitted that the charges in question grossly exceed the taxes for which appellants would have been liable had they actually operated their tractors during the entire period in question. In fact, most of the taxes in question had already accrued against Eastern before appellants' tractors "were even manufactured" (R. 31).

The somewhat fantastic nature of what has thus been sanctioned by the court below is perhaps best expressed by way of analogy. Assume that Eastern had owned 15 houses, and that International held a mortgage on house No. 1. The water rents payable for house No. 1 would, of course, be a lien prior to International's mortgage. The decision below, however, would suggest that the water rents on the other fourteen houses, after Eastern's failure to pay them, could become a valid lien on house No. 1 prior to International's mortgage. The claim here, similarly, is that appellants, as conditional vendors of three tractors, can be compelled to pay the entire amount due from Eastern for the use of all its other vehicles. We submit that the claim cannot be sustained.

There is no doubt as to the validity of a statute imposing liability on the owner of a vehicle for damage done by another operating the vehicle. However, were Eastern to have rented vehicles from both appellants and another, it requires more than credulity to assert that appellants' vehicle could be taken for damages inflicted by Eastern while operating the vehicle rented

from another. So far as is known, aside from the holding below, there are no decisions or statutes which sanction a result so in conflict with reason and proprietary fairness.

It is difficult to know how to pose the question in order to discuss the matter from a constitutional point of view. It is unrealistic to say that a tax liability is involved since the Attorney General of New York has ruled that appellants as conditional vendors cannot be taxed as the owners of the tractors involved under the provisions of Section 503, which subjects an owner to liability for the tax jointly and severally with an operating carrier other than the owner. It is even more difficult to view the charge in question as a matter of lien priority. Although this question is not free of doubt (see *In re Grunier*, 295 N.Y. 510, 68 N.E. 2d 514), we assume that the State of New York can exercise and has exercised the full scope of its prerogative of tax lien priority. That prerogative, however, involves the payment of taxes assessed against a debtor's property to an amount not in excess of the value of the interest of the debtor in such property. The seizure of debtor's property subject to the interest of the creditor is to be contrasted with the seizure of the property of the creditors themselves. The latter amounts to a taking of property. Viewed as a taking of property, the charges here are valid only if the use of the property is illegal or against public policy, or some compensation in the nature of a benefit has been awarded appellants, or the implied consent of appellant can be said to have been obtained. *Van Oster* v. *Kansas*, 272 U.S. 465; *Provident Institution for Savings* v. *Jersey City*, 113 U.S. 506; *Dunbar* v. *City of New York*, 251 U.S. 516; *Lindsay & Phelps Co.* v. *Mullen*, 176 U.S. 126.

I. Article 21 of the New York Tax Law, as here applied, fails to meet the test of due process

Due process is concerned with whether a tax in practical operation has relation to opportunities, benefits or protection conferred or afforded by the taxing state. *Ott* v. *Mississippi Valley Barge Line Co.*, 336 U.S. 169. Although the older cases hold that the taxpayer must derive some direct benefit with respect to the assessment of property taxes, *Thomas* v. *Kansas City Southern Ry. Co.*, 261 U.S. 481, the Court has come to require only that there must be "some relation" to the advantages or benefits to be secured. *Nashville, C. & St. L. Ry.* v. *Walters*, 294 U.S. 405. The benefit need not be direct, but nevertheless the Court has not abdicated the position that there must be some benefit. *Wyles Salt Co.* v. *Iberia Drainage Board*, 239 U.S. 478.

Article 21, as here applied to appellants, fails to meet that test. The purpose of Article 21 is to relate the cost of repairing and maintaining roads more directly to those who contribute most to deterioration of the roads, and who presumably reap the greater share of their benefits. The very fact that the State of New York has seen fit to create this type of highway use tax, instead of continuing to pay for highway repairs out of more general levies, indicates that the State feels that the greatest benefits accrue to carriers. The stated purpose of Article 21 is to—

> "distribute more equitably [the] financial burden [of maintaining public highways] and to compensate the state in part for the privilege granted to such heavy vehicles of using the highways of the state and for the cost of administering state traffic regulations." (N.Y. Sess. Laws 1951, c. 74 § 1)

The benefit stemming from the imposition of the tax is thus derived by those who operate commercial vehicles for profit on the public highways of New York.

Appellants are not in that category. Nor, as to them, may the tax be sustained on the ground that they derive a benefit in the sense that the business of selling tractors and trucks is dependent upon the maintenance of highways for the tractors and trucks to use. It might also be asserted that filling station and garage owners derive a similar benefit, since if there were no highways there would be no tractors and trucks to repair. In fact, of course, vendors and repairers of tractors and trucks would derive more benefit from less well-maintained highways which would hasten the deterioration of such vehicles. In short, the vendors of tractors and trucks receive no more benefit from the highway use tax than do hosts of others who are engaged in the wide variety of businesses which are today dependent on automotive transportation.

Of course, the State of New York may support its public highway system by general taxation. When it abandons that pattern of taxation, however, and levies a specific use charge, the charge must have a reasonable relationship to value received for use of the facilities charged for. *Ingels* v. *Morf*, 300 U.S. 290. So long as the tax is levied for highway purposes it is "valid unless the amount is shown to be in excess of fair compensation for the privilege of using state roads." *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542, 547. Here, however, it is not even alleged that Appellants have ever exercised the privilege of using the roads of New York. Appellants, in other words, who do not exercise the "privilege of using state roads" them-

selves, face the virtual confiscation of their three tractors to satisfy the tax liabilities of Eastern, most of which arose from Eastern's exercise of that privilege with a large fleet of trucks and tractors with which appellants had no connection whatever.

A related question was faced by this Court in *Lindsay & Phelps Co.* v. *Mullen*, 176 U.S. 126, 143. There the issue presented was "whether the [property] of one party [could] be subjected to a lien for surveying and scaling not only his own [property], but also for surveying and scaling [property] belonging to other parties." According to the Court, "the statement naturally suggests a negative answer, and ordinarily it may be affirmed that no man's property can be subject to a lien for services rendered upon some other man's property." In spite of the negative suggestion, the Court upheld the lien by using the fictions of imputing ownership of the property to the lienor, and implying the consent of the actual owner, as well as finding public necessity in the prevention of injury to life and property. The use of such a finding or the application of such fictions to appellants in the instant case involves such a game of will-o'-the-wisp that the courts below did not attempt it.

II. The lien provisions of Article 21 cannot be sustained on the ground that they are necessary for the collection of the highway use tax

There has been no discernible finding by either the Courts or the legislature that public necessity is involved in the lien provisions. Rather, the attempt to support them is based on the mere convenience of the State—an assertion not unfamiliar in attempts to sup-

port unfair state action when it is challenged on due process grounds.

The purpose of the enforcement provisions of Article 21 is of course to insure that the highway use tax will not go unpaid—that it will be paid by someone. Aside from convenience, however, there is no connection between appellants' property and the amount of the lien. No doubt New York would find it less convenient were it required to apportion the taxes to the property which Eastern possessed in the tractors at the time the taxes were assessed, or to the taxes which had actually accrued from the operation of the three vehicles. But inconvenience alone is no answer. Absent a definable benefit and a reasonable relation to appellants, their property may not be taken to satisfy New York's convenience.

Certainly the argument made by appellees that such a provision is valid on the ground that it is necessary in order to insure the collection of use taxes is not borne out by the experience of other states. Of the states which impose highway use taxes only New York has attempted a collection device which permits not only the manifest unfairness of the present case, but indeed would permit the same result had the appellants allowed their trucks to be used gratuitously.

Of fifteen states* which presently have highway use tax provisions, eight have accompanying lien provisions and of those only three give the lien priority. Five states have lien provisions which attach to property other than that of the taxpayer. Only two states—Oklahoma and New York—have prior lien provisions which attach to property other than that of the de-

* See Appendix A.

linquent taxpayer. However, the Oklahoma lien provision differs materially from that of New York in that the lien which Oklahoma asserts is limited to the amount of unpaid taxes accrued by the individual vehicle while the New York lien purports to place a prior lien on the vehicle for all delinquent highway use taxes without regard to the amount of taxes attributable to the individual vehicle to which the lien attaches.

There is no question as to the validity of those statutes which place a prior lien on a vehicle for the use taxes attributable solely to the vehicle involved without regard to ownership. Nor do appellants deny the validity of the lien provisions of those states which place a lien for all the use taxes of a delinquent carrier on a single vehicle if the lien is not made paramount to the property of the non-taxpayer owner. However, a combination of the two results in the taking of property rights without adequate compensation and without bestowing a reasonably related benefit.

If the present lien provision can be justified on the ground of convenience, we can see no reason why, for convenience sake, the lien provision could not be extended to cover all of the taxes which a taxpayer owes the State. Except for the name given the tax, there is no more relationship between the taxes the appellees are trying to collect by the sale of these vehicles and other types of taxes which Eastern may owe the State. Convenience, without more, would dictate that the liens for Eastern's unpaid taxes be placed on all of appellants' property, personal and real.

The state courts which have considered the property interest of conditional vendors in relation to an at-

tempt by the state to levy on the property for the delinquent taxes of conditional vendees have, with a single exception, protected the vendors' interest.

In *Pacific Finance Corp. v. Snohomish County*, 160 Wash. 384, 295 Pac. 110, 112, the State had seized for the vendee's unpaid taxes a vehicle sold under a conditional sales contract. After the vehicle had been seized, but prior to its sale, the vendor repossessed. The Supreme Court of Washington, held that the vehicle could not be sold to satisfy the vendee's taxes. A recent case reaches the same result under the Federal tax lien provision. *United States v. Anders Contracting Co.*, 111 F. Supp. 700 (W.D.S.C.).

Universal Credit Co. v. Mamminga, 214 Ia. 1135, 243 N.W. 513, 514 is directly in point. In that case the conditional vendor had repossessed a vehicle prior to the State's seizure of the truck for the delinquent highway use taxes of the conditional vendee. The Iowa Supreme Court, after expressly reserving pronouncement with respect to the constitutionality of the lien provision, held that the vehicle could not be sold by the state to satisfy the delinquent taxpayer's taxes. As phrased by the Iowa Supreme Court, the question revolved around the nature of the property interest which the taxpayer had in the vehicle. That is to say, "to what 'property' could the tax lien attach? . . . [A]ssuming that the purchase price of the truck was $1,500, and that the motor carrier had paid only $500 on the purchase price under the conditional sales contract, could the tax in question be enforced against the truck itself and sale thereof, or could said tax and penalty be enforced only against the interest which the motor carrier had in said truck?" The Iowa Supreme Court concluded that since the truck had been repossessed

by the conditional vendor prior to the time the state attempted to assert its lien, the conditional vendee had no interest in the truck which could be reached to satisfy its delinquent use taxes and the truck could not, therefore, be reached by the lien.

The single exception to the above line of cases construed the statutory lien provisions of the Kansas highway use tax, which have now been repealed. The case in question is *Freuhauf Trailer Co. v. State Corp. Comm.*, 149 Kan. 465, 87 P.2d 641. Aside from the fact that the Kansas statutory lien provisions have been repealed,* the *Freuhauf Trailer* case is distinguishable on the ground that in Kansas a conditional sales contract is construed as the equivalent of a chattel mortgage, thus leaving the vendor with nothing more than a security interest in the property. A more important distinction lies in the fact that in the *Freuhauf Trailer* case the state had asserted the lien prior to the default by the vendee and repossession by the vendor. Even on the facts of the *Freuhauf Trailer* case, however, it is submitted that the Kansas Supreme Court went astray; and that the "dubitante" opinion by the Chief Justice, which would have limited the lien to taxes actually accrued by the vehicle, reached the correct result.

III. VIEWED AS EITHER AN ASSESSMENT OR A LIEN, THE LIEN PROVISIONS OF ARTICLE 21 RESULT IN AN ARBITRARY AND UNREASONABLE TAKING OF APPELLANTS' PROPERTY.

While moneys raised by general taxation may constitutionally be applied to purposes from which the

* One may conjecture whether the virulent construction placed on the lien provision by the majority of the Kansas Supreme Court did not result in a repeal by the Kansas legislature on constitutional grounds.

individual taxed may receive no benefit, and indeed, suffer serious detriment; *St. Louis & Southwestern Ry. Co. v. Nattin*, 277 U.S. 157, 159; *Memphis & Charleston Ry. Co. v. Pace*, 282 U.S. 241, 246; so-called assessments for public improvements laid upon particular property owners are ordinarily constitutional only if based on benefits received by them. *Myles Salt Co. v. Iberia Drainage Board*, 239 U.S. 478; *Gast Realty Co. v. Schneider Granite Co.*, 240 U.S. 55; *Kansas City So. Ry. Co. v. Road Imp. Dist. No. 6*, 256 U.S. 658; *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405, 429.

It is also true that some taxes, like those on corporate franchises, cannot be broken down and attributed to the separate items of property possessed by the corporation. *New York Terminal Co. v. Gaus*, 204 N.Y. 512, 98 N.E. 11. This may also be true of moneys expended by the State to remove a grade crossing. *New York v. Gebhardt*, 151 F.2d 802 (2d Cir.). Unlike these taxes and claims, the highway use tax is simply and accurately apportioned to the last mill, according to the measure of benefit received. When the tax is for benefits conferred by the State, and especially when the formula for ascertaining the proportion of benefit is clear, this Court has insisted that the State limit its claim to the amount which may properly be apportioned to the property to be charged. *Myles Salt Co. v. Iberia Drainage Board*, 239 U.S. 478; *Southern Ry. Co. v. Kentucky*, 274 U.S. 76.

Under the Constitution, "the public is denied the *power* to make a special assessment where no benefit is conferred, and therefore benefit is a necessary predicate to exercise of such power, and without it there is no foundation for the assessment and no jurisdiction

to make it." *Falor* v. *Moug*, 47 Ohio App. 942, 191 N.E. 445, 447.

Since the New York highway tax lien is not concerned with seizure of property of the tax debtor or with the tax liability of the owner of the property which was seized, it is difficult to see how the decision in *Marshall* v. *New York*, 254 U.S. 380, 382, of which much was said below has anything to contribute in the way of support for appellees' position. There as stated by Mr. Justice Brandeis, the Court was not presented with any question "as to the priority of the State over incumbrances. The single question . . . presented [was] whether the State of New York [had] priority in payment out of the general assets of the debtor over other creditors whose claims are not secured by act of the parties nor accorded a preference, by reason of their nature, by the state legislature or otherwise." The final sentence of the opinion affirms this distinction for it was not there "sought to gain priority over a lien existing at the time when the receiver was appointed; and the priority over unsecured creditors is granted by the common law of New York."

The holding of the court below was epitomized in the assertion that "[t]he power of the State to establish priority for tax debts due it cannot be questioned." (R. 16) Thus characterized as a matter of priority and coupled with a tax bearing no relation to the property taken, the rights of the tax collector are vastly greater than those which Eastern would have had against its creditors. Purely as a matter of priority the Court was in error; for the "rights of the collector [can] rise no higher than those of the taxpayer." *United States* v. *E. Regensburg & Sons*, 124 F. Supp. 687 (S.D.N.Y.); *United States* v. *Winnett*, 165 F.2d 149

(9th Cir.); *Karoo-Smith Co.* v. *Maloney*, 112 F. 2d 690 (3d Cir.).

The "power" accorded by Section 506 of Article 21 of the New York Tax Law assumes that the State may deal with the property of appellants as it would with the property of Eastern, the delinquent taxpayer. This assumption, as we have shown, is not made out of necessity. Other states have succeeded in administering and collecting highway use taxes without resort to such a scheme. The raison d'être here therefore, must be nothing more than convenience in collecting the use tax.

Appellants acknowledge that property rights have come to be less protected by due process than have rights regarded as more personal in nature. However that may be, appellants have been unable to find in any opinion by this Court an inference that property rights may be as whimsically and arbitrarily dealt with as theirs have been. According to Mr. Justice Story, so-called priority cannot "divest a specific lien, attached to a thing, whether it be accompanied by possession or not. . . . And before such a decision is made, it will deserve very grave deliberation. . . ." *Conard* v. *Atl. Ins. Co. of N. Y.*, 1 Pet. 386, 441. Much graver is the deliberation when the divestiture of property rights is so unreasonable that mere convenience is its sole support.

According to the admonition contained in the opinion below (R. 16), if "the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred, the law cannot stand against the complaint of one so taxed in fact." *Gast Realty Co.* v. *Schneider Granite Co.*, 240 U.S. 55, 58, 59. In spite of this, the holding was that "the constitutionality of a

law is not to be determined solely on the ground that some hardship may result from its application." (R. 16) But as this Court has said in a similar situation, we are not dealing here with probabilities but with "resultant action; we are not dealing with disputable grounds of discretion or disputable degrees of benefit, but with an exercise of power determined by considerations not of the improvement of plaintiff's property but solely of the improvement of the property of others—power, therefore, arbitrarily exerted, imposing a burden without compensating advantage of any kind." *Myles Salt Co.* v. *Iberia Drainage Board*, 239 U.S. 478, 485.

In cataloguing the outermost constitutional bounds with respect to the power of the States to derogate from mortgage security, Mr. Justice Cardozo acknowledged that even the invocation of public welfare would not serve as an excuse for the unnecessary and arbitrary confiscation of the mortgagees' property. His comments are significantly appropriate here:

> "With studied indifference to the interests of the mortgagee or to his appropriate protection they have taken from the mortgage the quality of an acceptable investment for a rational investor; [and so] . . . . viewed they are seen to be an oppressive and unnecessary destruction of nearly all the incidents that give attractiveness and value to collateral security." *W. B. Worthen Co.* v. *Kavanaugh*, 295 U.S. 56, 60, 62.

The cases decided by this Court which bear a marked similarity to the present case demonstrate clearly the invalidity of the highway use tax lien. In *Hooper* v. *Wisconsin*, 284 U.S. 206, the State tried to measure the tax liability of the head of a family by the total of the sums earned by him and by his wife and children.

Despite the argument that this money was really one income, used for one integrated family group, and that the head of the family derived a substantial benefit from it, this Court held that the tax violated due process. In its opinion, this Court quoted, with approval, the following language from *Knoxville* v. *Water*, 178 U.S. 41, 77:

> "'It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems.'" 284 U.S. at 215.

This Court went on to say:

> "We have no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the Fourteenth Amendment. That which is not in fact the taxpayer's income cannot be made such by calling it income." (ibid.)

In *Southern Ry. Co.* v. *Kentucky*, 274 U.S. 76, the State undertook to measure the tax on a railroad wholly within Kentucky by reference to the income of connecting lines owned and operated by the same parent corporation, and represented as an integrated system in the schedules and advertising of the parent. This Court decided that such an apportionment violated due process because of the arbitrary manner in which

it attributed earnings of the whole system to the tax payer railroad.

In *Myles Salt Co. v. Iberia Drainage Board*, 239 U.S. 478 a drainage district was created which included within its boundaries an island which required no drainage. This Court held that since the island did not and could not benefit, the attempt to tax it for drainage facilities constructed for the benefit of other property was an unconstitutional confiscation.

There is no difference between the effect of the statutes declared void in these cases and the effect of the statute here questioned. The latter seeks to impose a tax burden on appellants which is measured by Eastern's use of the highways by its entire fleet of fifteen vehicles. Surely such a statute must be considered to violate the "fundamental conceptions which underlie our system". *Hooper v. Wisconsin*, 284 U.S. 206, 215.

To the same effect is *Rapid Ry. Co. v. Schroeder*, 190 Mich. 684, 157 N.W. 422, in which the Michigan Supreme Court ruled unconstitutional a taxing statute which purported to tax one unit of a group of railways, owned and operated by the same company, on the basis of the property owned by other units in the system. Here again, there was a refusal to sanction a purely arbitrary measure of tax liability.

The invalidity of the enforcement procedure which appellees seek to invoke is emphasized by the further fact that appellants could not learn of Eastern's tax deficiency. The so-called "secrecy provisions" of Section 514 of Article 21 which were in effect when the claim against appellants was asserted[*] made it legally

[*] They have since been repealed. N.Y. Sess. Laws 1955, c. 165.

impossible for an appellant to discover whether Eastern as a prospective purchaser was in any way delinquent in the payment of its highway use taxes. The only notice appellants had of Eastern's delinquency took place after the tractors had been repossessed, and this notice was in the form of the actual placing of the liens in question.

Because of the secrecy provisions appellants were not only denied notice of proceedings affecting their property interests, but they were denied any information that they might have requested. While the state may prescribe the kind of notice and the mode in which it shall be given, it cannot dispense with notice completely.

Any discussion of the constitutionality of the statute here questioned must include an examination of its practical effects, for the real question in constitutional law "is how the State makes the exaction [of highway use taxes]—that is, what is the nature of the exaction, its basis and its practical operation." *Bode v. Barrett*, 344 U.S. 583, 589.

The New York lien provision, if sustained, will have far-reaching effects on established commercial practices because it places upon a conditional vendor the intolerable risk of losing his property for satisfaction of a vendee's taxes.

The only safe alternative left conditional vendors who wish to sell in New York would be to sell on a strictly cash basis. The high cash cost of large commercial vehicles would be prohibitive to most prospective purchasers. As a result, new companies would not enter the field of commercial transportation and smaller companies would be driven from the field as their presently

existing vehicles wear out. Section 506 of Article 21 of the New York Tax Law thus may place an insurmountable burden on appellants as industrial vendors of commercial vehicles. Aside from the demonstrable result of Section 506 which takes appellants' property without either substantive or procedural due process, unless prospective purchasers are able to make immediate payments in cash; appellants and other vendors similarly situated become immediately liable for the purchasers' prior taxes.

Appellants do not, of course, argue that the State of New York, upon a real finding of public necessity, would not have the constitutional power to severely limit or curtail credit transactions in the State. However, absent even an allegation of public necessity, appellants deny that their property may be taken and their business curtailed solely because of an overly broad statutory tax lien provision. One mile of highway use by a single vehicle, which involves a tax liability of less than one cent to the purchaser, may result in a tax liability to the vendor of several thousand dollars. Without a finding by the legislature that it is in the public interest that commercial vendors should be required to sell for cash, such a result cannot be sustained.

CONCLUSION

Section 506 effectively precludes the retention of the normal and customary security interest by the vast majority of industrial vendors of large commercial vehicles. Such a preclusion has clearly resulted in an unconstitutional taking of appellants' property without due process of law. No notice was given; access to pertinent information was forbidden; no hearing was held. It is not even alleged that a benefit was con-

ferred. No mention was made of consent. Indeed, such an unnecessary taking of the property of one person to pay the taxes of another is in itself clearly a violation of both procedural and substantive due process.

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

JOHN LORD O'BRIAN
CHARLES A. HORSKY
ROBERT L. RANDALL
701 Union Trust Building
Washington 5, D. C.
Attorneys for Appellants

JOHN T. DE GRAFF
COVINGTON & BURLING
Of Counsel

APPENDIX A

States Imposing Highway Use Tax	Lien Provision	Prior Lien Provision	Property to Which Lien Attaches
1. Alabama Ala. Code, Tit. 48 §§ 301 (34), 301 (44) (1940)	Yes	No	All property of taxpayer.
2. Colorado Colo. Sess. Laws 1954, c. 31, §§ 3, 5 (5)	Yes	No	All personal property of taxpayer.
3. Florida Fla. Stat. Ann., §§ 323.15, 323.15 (1) (1943)	Yes	Yes	All real and personal property of taxpayer.
4. Idaho Idaho Code, § 49-127 (1948)	No	No	
5. Kentucky Ky. Rev. Stat., § 281.815 (1953)	No	No	
6. Maryland Md. Code Ann. Art. 81, § 269 (Flacks 1951)	No	No	
7. Michigan Mich. Stat. Ann. §§ 22.561, 22.564 (1937)	Yes	No	All personal property of carrier and also upon the vehicles of all persons leased by the taxpayer in its business.
8. New York N.Y. Tax Law Art. 21, §§ 503, 506 (1954)	Yes	Yes	All motor vehicles and vehicular units of taxpayer and also upon all vehicles and vehicular units used by taxpayer in its business.
9. North Dakota N.D. Rev. Code, § 39-0423 (1943)	No	No	
10. Ohio Ohio Rev. Code An., § 5728.06 (Page's 1954)	No	No	

APPENDIX A (Continued)

States Imposing Highway Use Tax	Lien Provision	Prior Lien Provision	Property to Which Lien Attaches
11. Oklahoma Okla. Stat. Ann. Tit. 47 §§ 22.5, 22.7 (1941)	Yes	Yes	Only upon the vehicle upon which the tax is due.
12. Oregon Ore. Rev. Stat. Tit. 57 § 767.825 (1953)	No	No	
13. South Carolina S.C. Code of Laws § 58-1433 (1952)	No	No	
14. South Dakota S.D. Code § 44.0426 (1939)	Yes	No	All personal property of taxpayer and also upon the vehicles of all persons leased by the taxpayer in its business.
15. Wyoming Wyo. Comp. Stat. §§ 60-1327, 60-1330 (1945)	Yes	No	All vehicles owned and operated by the taxpayer.

16. Kansas and New Mexico have recently repealed highway use tax statutes with their accompanying lien provisions. Kan. Laws 1955 c. 294; N.M. Laws 1955 c. 276, § 7.